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Supreme Court of the United States

OCTOBER TERM, 1996

AMOCO ENERGY TRADING CORPORATION, AMOCO PRODUCTION COMPANY, ANADARKO PETROLEUM CORPORATION, CONOCO INC., INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA and MARATHON OIL COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS NORAM FIELD SERVICES CORP., NORAM GAS TRANSMISSION CO., GPM GAS CORP. AND WILLIAMS FIELD SERVICES CO. IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals and the Federal Energy Regulatory Commission correctly determined that § 1(b) of the Natural Gas Act, by expressly excluding the gathering of natural gas from the Commission's jurisdiction, precludes the Commission from regulating NorAm Field Services Corp.'s gathering activities and facilities.

PARTIES TO THE PROCEEDINGS

Respondents NorAm Field Services Corp. ("NFS") and NorAm Gas Transmission Company ("NGT") are organized and existing under the laws of the State of Delaware. NFS has its principal place of business located in Shreveport, Louisiana and NGT has its principal place of business located in Houston, Texas. The parent of both NFS and NGT is NorAm Energy Corp. ("NorAm"). NorAm has no subsidiaries that are not wholly owned. On August 21, 1996, NorAm entered into a definitive merger agreement with Houston Industries Incorporated, a publicly traded company.

Respondent GPM Gas Corporation ("GPM") is organized and existing under the laws of the State of Delaware and has its principal place of business in Houston, Texas. GPM is wholly owned by Phillips Gas Company ("PGC"), also a Delaware corporation headquartered in Houston, Texas. All common stock of PGC is owned by Phillips Petroleum Company ("Phillips"), a Delaware corporation headquartered in Bartlesville, Oklahoma. Phillips and PGC each have publicly traded securities.

Williams Field Services Company ("Williams") is wholly-owned by Williams Field Services Group, Inc., which is wholly-owned by Williams Holdings of Delaware, Inc., which is wholly-owned by The Williams Companies, Inc. ("TWC"). The following are subsidiaries of TWC which are not wholly-owned by TWC: Apco Argentina Inc.; Kern River Gas Transmission Company; NESP Supply Corporation; Tubexpress, Inc.; Reservco Inc.; Altra Energy Technologics L.L.C.; TransNetwork Holding Company; Nebraska Energy, L.L.C.; Wiljet, L.L.C.; Parkco, L.L.C.; Free Port Terminal Company Limited; American Soda,

L.L.P.; Kiowa Gas Storage, L.L.C.; Northern Border Partners, L.P.; and Northern Border Intermediate Limited Partnership.[1]

[1] Although their facilities are not involved in these proceedings, respondents Williams and GPM share an interest in the legal issues presented. Williams is, like NFS, a gathering affiliate of an interstate pipeline. GPM has acquired facilities from an unaffiliated interstate pipeline.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. THE DECISION BELOW DOES NOT IMPLICATE, LET ALONE CONFLICT WITH, THIS COURT'S DECISIONS IN *MAISLIN* AND *MCI*.	3
II. THE DECISION BELOW IS COMPLETELY CONSISTENT WITH, AND INDEED IS COMPELLED BY, THIS COURT'S DECISIONS CONSTRUING THE NATURAL GAS ACT	4
III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases **Page**

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 7
Colorado Interstate Gas Co. v. FPC, 324 U.S. 581 (1945) 4, 5, 6
FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949) 4, 5, 6, 7
Interstate Natural Gas Co. v. FPC, 331 U.S. 682 (1947) 4, 5
MCI Telecommunications Corp. v. American Telegraph & Telegraph Co., 114 S. Ct. 2223 (1994) . . 3, 4
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 3, 4
Northern Natural Gas Co. v. FERC, 929 F.2d 1261 (8th Cir.), *cert. denied*, 502 U.S. 856 (1991) 8
Northwest Pipeline Corp. v. FERC, 905 F.2d 1403 (10th Cir. 1990) 1
Panhandle Eastern Pipe Line Co. v. Public Service Committee, 332 U.S. 507 (1947) 4
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) 5
Transcontinental Gas Pipe Line Corporation v. FERC, 998 F.2d 1313 (5th Cir. 1993) 8

Statutes

Natural Gas Act, 15 U.S.C. §§ 717-717z 1
15 U.S.C. § 717(b) 1, 3, 4, 5
15 U.S.C. § 717(c) 5
15 U.S.C. § 717(d) 5

Agency Orders

Amoco Production Co., 64 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,027 (1993) 3
Farmland Indus., Inc., 23 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,063 (1983) 1

Northern Natural Gas Co., 74 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,289 (1996) 2
Panhandle Eastern Pipe Line Co., 73 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,343 (1995) 2
Southern Natural Gas Co., 72 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,109 (1995) 3
Order No. 636, 57 Fed. Reg. 13,267 (1992), *on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), *on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (1992), *aff'd in part and remanded in part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (per curiam) 2
Order No. 436, 50 Fed. Reg. 42,408 (1985), *on reh'g*, Order No. 436-A, 50 Fed. Reg. 52,217 (1985), *on reh'g*, Order No. 436-B, 51 Fed. Reg. 6,398 (1986), *on reh'g*, Order No. 436-C, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,404, *on reh'g*, Order No. 436-D, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,405, *on reh'g*, Order No. 436-E, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,403, (1986), *vacated in part by Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 2

STATUTORY PROVISIONS INVOLVED

In addition to those provisions appearing in the petition at 2-3, the following statutory provision is involved in this case. Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), provides:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT OF THE CASE

At issue in this case is the Federal Energy Regulatory Commission ("the Commission") determination that the Natural Gas Act denies it jurisdiction over the "gathering" of natural gas by respondent NFS. "Gathering" is the process by which natural gas is collected from wells and brought by various lines to a point where it is transferred to a transmission pipeline. *See Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404, n. 1 (10th Cir. 1990).[2] The Natural Gas Act, upon which petitioners rely, expressly "[does] not apply to . . . gathering of natural gas." 15 U.S.C. § 717(b).

Historically, pipelines provided "bundled" transportation and sales services. Bundled transportation service included under a single rate the gathering, transportation and storage of natural gas. Bundled sales service included all of these services plus the cost

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[2] Gathering is distinguished from transmission by a number of factors, including the size and operating pressure of the lines, their configuration, and the location of wells and processing plants. (Pet. App. 47.) *See generally Farmland Indus., Inc.*, 23 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,063 (1983). The Commission found (Pet. App. 47-54) and petitioners do not now dispute (Pet. 10 n.8.) that the facilities and services in question are "gathering."

of the gas itself, in a combined rate. In 1992, the Commission issued Order No. 636,[3] requiring all interstate pipelines to "unbundle" their services. One effect on NGT and other pipelines was that gathering service must now be marketed and contracted for separately. In 1993, NGT, an entity engaged in interstate transportation and therefore subject to Commission jurisdiction, sought to transfer substantially all of its gathering assets, facilities, and services to a separate company, NFS, which would not be subject to Commission jurisdiction and could therefore compete on even terms with independent and producer-affiliated gathering companies.[4]

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[3] Order No. 636, 57 Fed. Reg. 13,267 (1992), *on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), *on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (1992) (collectively, "Order 636"), *aff'd in part and remanded in part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (per curiam). *See also* Order No. 436, 50 Fed. Reg. 42,408 (1985) (offering incentives for, but not requiring, unbundling), *on reh'g*, Order No. 436-A, 50 Fed. Reg. 52,217 (1985), *on reh'g*, Order No. 436-B, 51 Fed. Reg. 6,398 (1986), *on reh'g*, Order No. 436-C, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,404, *on reh'g*, Order No. 436-D, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,405, *on reh'g*, Order No. 436-E, 34 Fed. Energy Reg. Comm'n Rep. ¶ 61,403, (1986), *vacated in part by Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[4] The Commission noted that 70% of natural gas gathering is performed by companies not regulated by the Commission. (Pet. App. 148.) Among producers engaged in unregulated gathering are petitioners Amoco Production Co., Anadarko Petroleum Co., and Marathon Oil Co. *See* Joint Appendix at 496-98, *Conoco Inc. v. FERC*, No. 94-1724 (D.C. Cir. 1996). Moreover, some producers have sought to purchase gathering facilities from pipeline companies and relied on § 1(b) of the Natural Gas Act to avoid Commission regulation of their gathering activities, even while claiming here that § 1(b) does not apply to gathering by NFS. *See Northern Natural Gas Co.*, 74 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,289 (1996) (acquisition of gathering facilities by petitioner Conoco Inc.); *Panhandle Eastern Pipe Line Co.*, 73 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,343 (1995) (acquisition of

NFS sought a declaratory order that it, like other gathering companies, would be exempt from the Commission's jurisdiction pursuant to § 1(b) of the Natural Gas Act. The Commission found that it had no jurisdiction over NFS. (Pet. App. 54, 60-64, 135-40.)[5] The court of appeals upheld the Commission's jurisdictional determination. (Pet. App. 25.)

REASONS FOR DENYING THE WRIT

The petition should be denied because the decision below is squarely consistent with — and indeed is compelled by — this Court's precedents, it does not conflict with the decision of any other court of appeals, and petitioners' argument is without merit.

I. THE DECISION BELOW DOES NOT IMPLICATE, LET ALONE CONFLICT WITH, THIS COURT'S DECISIONS IN *MAISLIN* AND *MCI*.

Petitioners first distort this case as one in which the Commission abdicated jurisdiction over gathering without direction from Congress and suggest that this Court's decisions under the filed rate doctrine, such as *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. American Tel. & Telegraph Co.*, 114 S. Ct. 2223 (1994), have some bearing. In fact, Congress has expressly denied the Commission the power petitioners urge it to seize, and *Maislin* and *MCI* therefore do not apply.

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gathering facilities by Anadarko Gathering Co., a wholly owned subsidiary of petitioner Anadarko Petroleum Co.); *Southern Natural Gas Co.*, 72 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,109 (1995) (acquisition of gathering facilities by petitioner Amoco Production Co.); *Amoco Production Co.*, 64 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,027 (1993) (same).

[5] The Commission imposed certain conditions in its orders, some of which NorAm successfully challenged in the court of appeals (Pet. App. 25-33). Those conditions are not at issue here.

To invoke *Maislin* and *MCI*, petitioners simply ignore the jurisdictional provision of the Natural Gas Act, § 1(b), 15 U.S.C. § 717(b). In both *Maislin* and *MCI*, there was no dispute that the rates in question fell within the agency's statutory jurisdiction. *See Maislin*, 497 U.S. at 126-28; *MCI*, 114 S. Ct. at 2228. Those cases instead concerned what discretion the agencies had to relieve regulated entities from the statutorily imposed burden to charge only filed rates. Here, however, § 1(b) of the Natural Gas Act, which "determines the Act's coverage," *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm.*, 332 U.S. 507, 516 (1947) ("*Panhandle II*"), unambiguously provides that "[t]he provisions of this Act," including §§ 4 and 5, upon which petitioners rely, "*shall not apply to* . . . the production or *gathering of natural gas.*" 15 U.S.C. § 717(b) (emphases added). Section 1(b) governs this case. The court of appeals upheld "the Commission's determination that the gathering facilities at issue are exempt under NGA § 1(b)." (Pet. App. 25.)

The issue is therefore not whether the Commission had discretion to "deregulate" gathering, but whether the Commission correctly determined that Congress never brought gathering by NFS under federal regulation in the first place. In light of § 1(b)'s clear exclusion of gathering and this Court's recognition of "the care taken by Congress to keep the power over the production and gathering of gas within the states," *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 512 (1949) ("*Panhandle III*"), *Maislin* and *MCI* simply have no relevance here.

II. THE DECISION BELOW IS COMPLETELY CONSISTENT WITH, AND INDEED IS COMPELLED BY, THIS COURT'S DECISIONS CONSTRUING THE NATURAL GAS ACT

Petitioners' argument that the decision below conflicts with the decisions of this Court under the Natural Gas Act depends on selective and misleading citation of the relevant caselaw. It rests on the false premise that *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945), and *Interstate Natural Gas Co. v. FPC*, 331

U.S. 682 (1947), extended the Commission's jurisdiction to include the regulation of gathering. They did no such thing. *Colorado Interstate* itself recognized that § 1(b) precluded the Commission from "any control" of gathering, 324 U.S. at 602-03, and this Court has since recognized, in a decision relied upon by the court of appeals but not cited by petitioners, that *Colorado Interstate* and its progeny "are not precedent for" regulation of activities excluded by § 1(b). *Panhandle III*, 337 U.S. at 506, *quoted in* Pet. App. 17.

In 1938, Congress enacted the Natural Gas Act to "plug the 'gap'" in the regulation of the natural gas industry created by decisions of this Court denying states the authority to regulate interstate natural gas transportation and wholesale sales based on the negative implications of the Commerce Clause. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682-83 (1954); *Interstate Natural Gas Co. v. FPC*, 331 U.S. at 690. In § 1(b) of the Act, however, Congress carefully excluded from federal jurisdiction those areas in which the states were "constitutionally competent to act," *id.*, and thus expressly provided that the Act "shall not apply to . . . the production and gathering of natural gas." 15 U.S.C. § 717(b).

As interstate pipelines then operated, many provided gathering services in conjunction with interstate transportation or wholesale sales regulated by the Commission, and charged a "bundled" rate. In *Colorado Interstate*, 324 U.S. at 602-03 (emphasis added), this Court held that while "[c]ertainly [§ 1(b)] precludes the Commission from *any control* over the activity of producing or gathering natural gas," the Commission could take into account gathering costs "for the purposes of determining the reasonableness of rates *subject to its jurisdiction*," that is, bundled interstate wholesale rates. *Accord, Interstate*, 331 U.S. at 691; *Phillips*, 347 U.S. at 680-81.

Petitioners argue that this ratemaking authority under §§ 4 and 5, 15 U.S.C. §§ 717c, 717d, requires the Commission to regulate NFS and its gathering activities, though NFS provides no jurisdictional services. The authority recognized by *Colorado*

Interstate, however, does not go that far. Justice Jackson, who provided the deciding vote in *Colorado Interstate*, explained:

> The statute commands the Commission to regulate the price of natural gas transported and sold at wholesale in interstate commerce for resale. . . . [A] commission is free to take evidence as to conditions and events quite beyond its regulatory jurisdiction where they are thought to affect the cost of that whose price it is directed to determine. This, as I see it, is all that has been done here.

324 U.S. at 609 (Jackson, J., concurring). And that was all the Commission could do:

> [T]he Act excludes 'production or gathering of natural gas' from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction.

Id. Moreover, this Court has rejected precisely the reasoning advanced by petitioners. As the court below recognized, the ability to take production and gathering costs into account in setting jurisdictional sales rates "is not a precedent for" regulation of nonjurisdictional activities themselves. *Panhandle III*, 337 U.S. at 506 (discussing *Colorado Interstate*), *quoted in* Pet. App. 17.

In *Panhandle III*, this Court held, on facts closely analogous to this case, that the Commission could not regulate a natural gas company's transfer of facilities that fell within § 1(b)'s "production and gathering" exception.[6] With respect to the

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[6] Panhandle Eastern, an interstate pipeline company, sought to transfer to a separate company gas leases comprising 12% of its total gas reserves. The pipeline had previously included the reserves in its rate base for jurisdictional services and among the reserves that supported approval of its expansion of pipeline facilities. The Commission asserted authority to review the transaction. Although acknowledging that the leases were an element of production within § 1(b)'s production and gathering exclusion, the Commission sought to avoid § 1(b) by

provisions that petitioners here assert require the Commission to regulate NFS's gathering, the Court observed:

> Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms.

Panhandle III, 337 U.S. at 508. "The repetition of the words 'subject to the jurisdiction'" in those sections made "clear" to the Court that Congress did not intend those sections to reach matters excepted by § 1(b). *Id.* The Court concluded that to construe those sections

> [to] establish wide control by the [Commission] over the production and gathering of gas. . . . would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress.

Id. at 509.

Accordingly, the court of appeals correctly upheld the Commission's determination that it has no jurisdiction over NFS's gathering. Petitioners' argument that the court of appeals misapplied *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by deferring to the Commission rather than applying "settled law" (Pet. 17-19) is frivolous. The court of appeals faithfully adhered to this Court's precedents, summarized above. The court of appeals did not, as petitioners falsely claim, find that *Colorado Interstate* and its progeny "were not controlling due to claimed changed industry circumstances." (Pet. 17.) Rather, the court recognized that the holding in *Colorado Interstate* "expressly depended on the company's jurisdictional sales," and that this Court has never found "Commission jurisdiction over entities," such as NFS,

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relying on its ratemaking authority under §§ 4 and 5. *See Panhandle III*, 337 U.S. at 499, 507.

"performing neither jurisdictional sales nor jurisdictional transportation." (Pet. App. 16.) The court further recognized that this Court has allowed consideration of gathering only in setting jurisdictional rates, but has never permitted the direct regulation of unbundled gathering rates, as sought by petitioners. (Pet. App. 17.)

III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED

In an attempt to concoct a split among the circuits, petitioners point only to dicta in a footnote in *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir.), *cert. denied*, 502 U.S. 856 (1991). The footnote generically defined the court's reference to facilities "owned by the pipeline" to include facilities operated by a "parent, affiliate, subsidiary, or lessor[]." *Id.* at 1263, n. 2. *Northern Natural*, however, concerned only the Commission's ability to regulate gathering provided by a pipeline company itself.

Further, even if the quoted language of *Northern Natural* were not dicta, its reasoning would not apply here. Given the court's stated concern that failing to regulate a pipeline's gathering services could "in effect, permit the *pipeline* to establish rates for the interstate transportation," 929 F.2d at 1270, the blanket reference to related entities is more plausibly understood to refer to the Commission's undenied power to pierce the corporate veil between a natural gas company and affiliated entities and consider them as a single "natural gas company" if they unlawfully act in concert. *See Transcontinental Gas Pipe Line Corporation* v. *FERC*, 998 F.2d 1313 (5th Cir. 1993). Petitioners do not argue that the Commission should have done so here. Indeed, as the court of appeals acknowledged, the Commission orders under review conditioned the finding of no jurisdiction on "the affiliate maintain[ing] an independent, arms-length relationship with the

interstate pipeline," (Pet. App. 19).[7] Accordingly, it is much more convincing to read *Northern Natural* as being in harmony with the decision below, as the court of appeals regarded it (Pet. App. 19), than to strain to find a conflict in footnoted dicta.

Petitioners cite no other decisions of the courts of appeals that even arguably conflict with the decision below, and closely related issues are currently pending in other courts. (Pet. 13 & n. 12.) Accordingly, no purpose would be served by granting certiorari at this time.

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[7] The Commission imposed standards of conduct on NGT, the jurisdictional entity, to guard against the risk of affiliate abuse. (Pet. App. 63.) NorAm did not oppose those conditions.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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